

**THE STATE BAR OF CALIFORNIA  
COMMISSION FOR THE REVISION OF  
THE RULES OF PROFESSIONAL CONDUCT**

**\*REVISED MEETING SUMMARY - OPEN SESSION\***

**Friday, September 13, 2002**

**Oakland Airport Hilton  
1 Hegenberger Road  
Oakland, CA 94621**

**MEMBERS PRESENT:** Harry Sondheim (Chair); Stanley Lamport; Raul Martinez; Kurt Melchior; Ignacio Ruvolo; Jerry Sapiro; Mark Tuft; Paul Vapnek

**MEMBER ATTENDING BY TELEPHONE:** Ellen Peck

**ALSO PRESENT:** Kevin Mohr (Commission Consultant); Randall Difuntorum, Susan Ryan, Mary Yen (State Bar staff); Ira Spiro (ADR Committee); Sandra B. Price (Executive Committee of the Trusts and Estate Planning Section of the State Bar).

**I. APPROVAL OF THE OPEN SESSION REVISED MEETING SUMMARY FROM JUNE 7, 2002 MEETING**

The revised open session meeting summary was approved.

**II. REMARKS OF THE CHAIR**

**A. State Bar Sixth Annual Statewide Ethics Symposium**

Mr. Mohr thanked the Commission for participating in the Symposium. He reported the Commission's panel was well received and there were a number of positive comments on the Commission's town hall meeting. Mr. Difuntorum reported that he will keep the Commission posted on COPRAC's plans for the 2003 Annual Ethics Symposium.

**B. Schedule of Meetings for 2002-2003 Commission Year**

The meeting schedule was approved.

**C. Plans for Public Hearing at the State Bar's Annual Meeting**

Mr. Difuntorum reported that the Commission will have a full day on Friday, October 11, 2002, in Monterey. The Commission will meet in the morning for a regular business meeting, then will hold a half-day public hearing in the afternoon. It was indicated that the notice of the public hearing is posted on the State Bar's website in the ethics area and that

the notice will be sent to the COPRAC distribution list of persons and groups interested in State Bar professional responsibility proposals.

### **III. MATTERS FOR ACTION**

General Comments: During the course of discussing this part of the Agenda, the following directions were given: (1) Mr. Sondheim stated that a standing instruction to every assigned drafting team is to assume responsibility for identifying and considering all public comments received by the Commission relating to their assigned Rule of Professional Conduct; (2) Mr. Sondheim instructed Commissioners to follow the COPRAC practice of exchanging comments by e-mail (including suggested drafts by members who are not on the drafting team) ahead of meetings in order for rules to be further along in the consideration process at meetings. These Commissioners are to copy Mr. Difuntorum and Mr. Mohr when sending such messages and drafts (Mr. Difuntorum will copy Ms. Yen, Lauren McCurdy and other Commission staff); and (3) for tracking purposes, staff is requested to put a date on each draft of each rule as it is generated by the Commission or a member of the Commission.

#### **A. Consideration of Rule 1-110. Disciplinary Authority of the State Bar**

The Commission considered a draft of proposed amended RPC 1-110 submitted by Mr. Lamport and Mr. Voogd stating:

“A member shall comply with conditions attached to public or private reprovls or to other discipline imposed pursuant to Business and Professions Code sections 6077 and 6078 and rule 956, California Rules of Court. *Discussion:* Other provisions also require a member to comply with conditions of discipline. (See e.g. Bus. & Prof. Code sec 6068((k) & (l).)”

During discussion, the following points were considered:

- (1) the original purpose of RPC 1-110 was to fill a gap for reprovls, to empower the State Bar Court to issue reprovls with conditions;
- (2) to avoid the prospect of tying RPC text to legislative enactments that are subject to future change, it was suggested that code section and Rules of Court citations should not be included in proposed rule drafts and, instead, drafting teams should consider using general language referring to “law or other rules”;
- (3) RPC 1-110 could be expanded beyond disciplinary conditions to include conditions imposed by other laws or rules or public agencies or tribunals;
- (4) the subject matter of this rule seems to be the place to have a connection between violation of non-disciplinary conditions involving private conduct, whether related to the practice of law or not, and being subject to discipline for that violation;
- (5) RPC 1-110 could incorporate provisions in B&P code subsections 6068(k) and (l);

(6) RPC 1-110 could be expanded to incorporate private conduct that leads to criminal conviction treatment under BPC section 6102;

(7) leave BPC section 6068(o) as a reporting matter and do not incorporate it;

(8) the Commission has not fully studied the implications of moving away from the original limited purpose of RPC 1-110 and expanding it to include personal conduct, in general, in an RPC as a basis for discipline.

Following discussion, a series of votes were taken to ascertain consensus for further drafting:

(1) The first vote was on Mr. Lamport's original proposal, which keeps to the limited intended purpose of RPC 1-110. The vote was 2 yes, 6 no.

(2) The second vote was on the following language and concept: "A member shall comply with conditions attached to public or private reprovals or to other discipline imposed pursuant to law or other rules or rulings by a tribunal". The vote was 2 yes, 6 no.

(3) The next vote was on the following language and concept: "A member shall comply with conditions attached to public or private reprovals and to any disciplinary probation, including probation imposed with the concurrence of the member, and shall [keep/perform] any agreement made in lieu of discipline." The vote was 5 yes, 3 no.

(4) The next vote was on the following language and concept: "A member shall comply with conditions attached to public or private reprovals [or discipline] by any public authority [in connection with the practice of law]." The vote was 3 yes, 5 no, 1 abstain.

(5) The next vote was on the following language and concept: "The wilful disobedience or violation of an order of any court requiring a member to do or forbear doing any act connected with or in the course of the member's profession, which the member in good faith ought to do or forbear doing, or any violation of the member's oath, or of the member's duties as an attorney, shall constitute cause for disbarment, suspension, or other discipline." This concept would take the language of B&P code section 6103 and make it a new rule. The vote was 3 yes, 4 no, and 1 abstention.

Mr. Sondheim assigned the drafting team of Mr. Lamport and Mr. Voogd to take version 3 (which received 5 favorable votes) and refine it into a new draft for the Commission's consideration. In completing this assignment the drafting team was instructed to obtain input from Mr. Vapnek and Mr. Sapiro, the members who suggested version 3, before submitting the draft to staff for circulation to the Commission.

**B. Consideration of Rule 1-120. Assisting, Soliciting, or Inducing Violations**

The Commission considered two drafts of proposed new Discussion section language for RPC 1-120 intended to clarify that California does not have a “snitch” rule. Both drafts were distributed with the agenda materials.

The first draft was submitted by Mr. Tuft. The 1st paragraph of this draft reads: “A member may, but is not required, to report to the State Bar the misconduct of another lawyer unless precluded by law or other rules.”

The second draft was submitted by Mr. Lamport, which he calls a proposed version 7 (seven versions of the rule were discussed at the June 7, 2002 meeting). It has a first paragraph substantively similar to Mr. Tuft’s first paragraph and a second paragraph with 3 sentences. The 3<sup>rd</sup> sentence of Mr. Lamport’s 2<sup>nd</sup> paragraph reads:

“A member may not report the misconduct of a lawyer if it would violate the member’s duty to maintain client confidence and secrets (see Bus. & Prof. Code sec 6068(e)), prejudice the interests of the member’s client or would involve the revelation of information obtained by the member while serving in an approved lawyer’s assistance program.”

Among the points raised during the discussion were the following:

- (1) there is a disconnect in placing the additional provision in RPC 1-120 because the new provision does not directly relate to what constitutes assisting, soliciting, or inducing violations;
- (2) Mr. Tuft’s 1<sup>st</sup> paragraph is a succinct statement that members are not required to “snitch” on other members;
- (3) the 3<sup>rd</sup> sentence of Mr. Lamport’s 2<sup>nd</sup> paragraph, if added to Mr. Tuft’s 1<sup>st</sup> paragraph, is a good start on the concept of providing guidance on factors to consider when members are faced with a decision whether or not to report misconduct;
- (4) it is important to insert a clarifying provision for members who do not know whether they have or do not have a duty to report other members’ misconduct;
- (5) members want assistance with how they should exercise discretion whether or not to disclose misconduct;
- (6) it is important to give guidance on the factors members should take into account;
- (7) it may be preferable to state guidance as factors to think about and consider, rather than as a declaratory statement;
- (8) RPC 5-100 is a better location for the additional provision and there could be a cross-reference in it to RPC 1-120;

(9) the use and meaning of the phrase “other rules” should be consistent in the RPCs;

(10) in Mr. Tuft’s 1<sup>st</sup> paragraph, the phrase “unless precluded by law” is awkward when the provision talks about members not being required to do something;

(11) in Mr. Lamport’s 2<sup>nd</sup> paragraph, the 1<sup>st</sup> and 2<sup>nd</sup> sentences are not necessary;

(12) in Mr. Tuft’s 1<sup>st</sup> paragraph, the comma should be moved from after “required” to be after “to”.

Following the discussion, a series of votes were taken to ascertain consensus for further drafting:

(1) On a motion to accept the 1<sup>st</sup> paragraph of Mr. Tuft’s draft, with the comma moved to be placed after “to”, the vote was 5 yes, 4 no.

(2) On a motion to accept the concept of providing guidance, which would be some version of Mr. Lamport’s 3<sup>rd</sup> sentence of his 2<sup>nd</sup> paragraph, the vote was 5 yes, 4 no.

(3) The next motion was to adopt in principle and refer back to the drafting team for refinement, the following language for providing guidance: “Reporting a lawyer’s misconduct may be inconsistent with the lawyer’s other duties, including, for example, the duty to maintain the client’s confidence and secrets (B&P code section 6068(e)), [to avoid] possible prejudice to the client’s interests, the explicit instruction of the client not to report such misconduct, or the revelation of information obtained by the member while serving in an approved lawyer’s assistance program.” The vote was 5 yes, 3 no, 1 abstain.

(4) The next motion was to move Mr. Tuft’s first paragraph into its own separate substantive rule of professional conduct. The vote was 3 yes, 5 no.

(5) The next motion was to move from proposed amended RPC 1-120 to an anticipated proposed amended RPC 5-100(re: threatening criminal, administrative, or disciplinary charges) Mr. Tuft’s first paragraph and the language adopted in principle, together with a cross-reference in RPC 1-120 to RPC 5-100. In discussion of the motion, it was noted that a lawyer from an ABA rule state logically would look to RPC 5-100 for these provisions because there are two relevant ABA ethics opinions that reference the ABA counterpart to RPC 5-100. It also was noted that a cross-reference in RPC 5-100 to RPC 1-120 would help lawyers find the matters covered by RPC 1-120. The vote on the motion was 5 yes, 4 no.

Mr. Sondheim assigned the drafting team of Ms. Betzner and Mr. Tuft to prepare a redraft in accordance with the consensus votes. In completing this assignment the drafting team was instructed to obtain input from Mr. Lamport.

**C. Consideration of Proposed New Rule 1-120X. Proposal Arising From Discussion of 1-120, re Incorporating Case Law and BPC Code Provisions**

(NOTE: To avoid confusion, the Commission directed staff to label this proposed new RPC (which originated during early discussion of RPC 1-120 and ABA Model Rule 8.4) as proposed new RPC 1-120X.)

The Commission considered a draft of a proposed new RPC submitted by Ms. Peck and Mr. Vapnek. The proposed new RPC would cover B&P code statutes and case law that are already binding on California attorneys. The concept is that by stating these standards in the RPCs, attorneys would be able to find most of their professional obligations in one place. Ms. Peck expressed the importance of having “other misconduct warranting discipline” (a concept found only in case law) and moral turpitude (a concept found both in case law and in B&P code section 6106) in a new RPC for attorneys to find.

During the discussion, the following points were raised:

- (1) ABA Model Rule 8.4 was the starting point for the draft;
- (2) by using the phrase “shall include” rather than the word “means”, and the phrase “but not limited to”, the definitional component of the proposed new rule would be flexible enough to account for developments in subsequent case law;
- (3) ABA Model Rule 8.4 shows the problem with trying to work from ABA rules that are inconsistent with California professional obligations enacted by the Legislature;
- (4) California attorneys have two parallel universes of obligations, one is established by the Supreme Court and the other is established by the Legislature, these comprise an overlapping matrix of responsibilities that make it problematic, if not impossible, to adopt many of the ABA rules as California RPCs;
- (5) to the extent that ABA rules, such as ABA Model Rule 8.4, contain provisions that are not found in California’s RPCs or the B&P code, then they expand the basis for discipline, and to the extent that they are inconsistent, then they run afoul of California statutes;
- (6) although the intent may be to gather professional obligations in one central location, some members do not use the RPCs as a comprehensive compendium of all professional obligations.

A vote was taken on whether the Commission should continue the effort to collect in one RPC a number of concepts from the B&P code and from case law. The vote was: 4 yes, 2 no, and 1 abstention.

The following word-smithing suggestions were offered to the drafting team:

- (1) remove the footnotes from the text because none of the RPCs use this format;

(2) put the guidance language into the Discussion;

(3) to the extent that provisions are derived from B&P code section 6106, include an express statement that the definitions of moral turpitude are from case law.

**D. Consideration of Rule 1-200. False Statement Regarding Admission to the State Bar**

The Commission considered a draft of proposed amended RPC 1-200 submitted by Ms. Foy and Mr. Sapiro.

The following points were made during discussion:

(1) concern that when paragraph (C) is considered together with paragraph (B), there could be an unintended consequence of counsel being subjected to disciplinary investigation and proceedings for false statements made by the client in an admissions case;

(2) part of the definition and description of “admission” is in the text and part is in the Discussion but it is preferable to put the definition in one place only;

(3) if paragraph (C) originally was inserted to avoid chilling advocacy in State Bar Court, it could be removed at this time;

(4) the comment from the last paragraph of ABA Model Rule 8.1 could be used to solve the problem posed by paragraph (C); and

(5) the drafting team must consider whether the better word to use is “applicant” or “member” or “lawyer”.

Mr. Sondheim asked Mr. Sapiro to give one more effort to redrafting the proposed amended rule. The COPRAC process for tentatively approving draft ethics opinions will be used for considering the drafting team’s anticipated redraft, which is: The drafting team will submit a revised draft rule to staff which will be sent to Commission members for a 10-day mail ballot vote. If two (or more) Commission members object to the draft, then the draft will be placed on the next agenda for further consideration. If there are less than two objections, the draft will be deemed tentatively approved. (Note that Commission members who object must state a reason for their objection.)

**E. Consideration of Rules 1-100 & 1-300. Rules of Professional Conduct, In General and Unauthorized Practice of Law**

Mr. Lamport invited comments from Commissioners on the issues outlined in his August 29, 2002 memorandum, and specifically invited suggestions on whether and, if so, to what extent, RPC 1-100 amendments should address the matters covered by the ABA Model Rules preamble.

As a general comment, Mr. Sondheim reiterated that Commissioners should exchange ideas ahead of time so that progress will be made before the time of the next meeting, and directed

that copies of communications in which ideas are exchanged should be sent to Mr. Difuntorum and Mr. Mohr.

In response to a question of whether MJP should be part of the consideration of RPC 1-100, MR. Difuntorum suggested that this issue is one aspect of RPC 1-100 that should be left to the assigned drafting team to consider in evaluating all possible amendments. Mr. Melchior, Mr. Sapiro and Ms. Julien will get together and make a recommendation on this aspect of the rule.

**F. Consideration of Rule 1-310. Forming a Partnership With a Non-Lawyer**

In response to a question concerning the status of the State Bar's consideration of MDP, Mr. Difuntorum reported that the current priority is to make Bar staff and resources available to assist the Supreme Court's MJP Task Force rather than to proceed with exploration of possible MDP pilot/demonstration programs. It was recommended the discussion of RPC 1-310 not be deferred because of MDP, which likely will not be an active issue on the Board of Governor's inventory until later next year, at the earliest.

**G. Discussion of Rules Numbering System & Its Relationship To the ABA Rule Numbering System**

Mr. Sondheim noted that a number of public comments suggest the RPCs be formatted in a way that utilizes the ABA rule numbering system. Mr. Mohr had noted earlier (during discussion of proposed RPC 1-120X and the chart of annotated ABA rule 8.4 and what all the states have done relating to it) that most states do follow the general ABA numbering system, or a close approximation the ABA numbering system, but states often have variations within a particular rule (for example, seven states have deleted MR 8.4(d) and another seven states have substantially amended it).

The first issue considered relating to this topic was, what numbering system to use as the Commission tentatively approves rule amendments and then posts such public drafts on the Bar's web site, initially, since the Commission does not have authorization to send out proposals for public comment apart from obtaining specific approval from the Board of Governors.

Mr. Lamport made a motion, seconded by Mr. Melchior with an amendment that is the last part of the motion, as follows: "As the Commission completes work on the rules, the Commission will ask staff to add the completed rules to the Bar's web site, with: (1) a note of explanation by staff to the effect that the rule has been tentatively approved using the current rule number and renumbering is an open issue to be considered at a later time; (2) a brief explanation of the proposal that identifies the ABA counterpart rule, if any; and (3) a statement that comments on a tentatively approved rule are welcome, subject to the understanding that no re-examination of the rule commented upon will be initiated until the appropriate time in the Commission's process."



During discussion of Mr. Lamport's motion, the following points were raised:

- (1) in prior rule revision efforts, the Commission did not publish partial text but waited until it had an integrated whole with which it felt comfortable, and the decision to renumber came at the end;
- (2) an early discussion of RPC 1-100 could resolve whether to go with the ABA numbering approach;
- (3) as the Commission works its way through the rules, some rules will not be materially inter-related to other rules and could be sent out sooner;
- (4) transparency is important even though it could mean members will receive proposed rules to consider at a blizzard pace;
- (5) numbering, format, scope and approach to the rules are inter-related - could California have the same numbering system but a materially different approach and scope?;
- (6) California cannot integrate the ABA proposed rules and numbering system because we have the State Bar Act that gives attorneys different duties and obligations from ABA rules, to the extent that California tracks the ABA numbering system it would imply that we are tracking the ABA rules which would not be true;
- (7) the ABA format breaks down into 8 parts, a large part of which does not apply to California because they do not comport with provisions of the State Bar Act;
- (8) a rule-by-rule analysis is needed to determine the purpose of each rule, this should be the approach rather than a discussion of the purpose of the rules as a whole.

Mr. Lamport's motion, with Mr. Melchior's amendment, was voted upon, with the following count: 8 yes.

Mr. Ruvolo made a motion, seconded by Mr. Vapnek, to not conform the RPCs to the ABA number system, for the reasons stated in the earlier discussion relating to Mr. Lamport's motion. The vote on the motion was 4 yes, 4 no, and 1 abstention. It was observed that this vote suggests a consensus to defer making a decision on whether to categorically accept or reject the ABA numbering system.

#### **IV. REPORTS OF THE COMMISSION MONITORS**

##### **A. Discussion of Process for Receiving Monitor's Reports**

Mr. Sondheim summarized staff's memorandum on options for receiving monitor reports. Following discussion, it was agreed that monitors would be responsible for advising the Chair and staff of the appropriate times when their item should be placed on the Commission's agenda.

**B. Staff Report on State Bar Board of Governor Activities**

Mr. Difuntorum reported that the State Bar's proposed amendment of RPC 3-310 is pending at the Supreme Court.

Mr. Difuntorum reported that COPRAC, through its liaison/member of the Limited Representation Committee of the Access to Justice Commission, provided comments on the Judicial Council's proposed court forms for limited scope representation in family court matters. As a result of COPRAC's comments and other comments, Judicial Council staff may decide to re-work the proposed court forms.

Mr. Difuntorum stated the Board of Governors adopted a revised Pro Bono Resolution on June 22, 2002. The Commission has been asked to consider the revised resolution during its review of the RPCs.

Mr. Difuntorum reported the Board of Governors accepted the Commission's recommended amendment to the State Bar Strategic Plan. As a result of the Commission's effort, the State Bar Strategic Plan now includes explicit language concerning the State Bar's role in monitoring the need to develop amendments to the RPCs.

Regarding the fax poll re AB 363, Mr. Difuntorum reported that the bill is enrolled and awaits the Governor's signature. The Board of Governors took a neutral position on the bill following the author's acceptance of amendments. The bill would add new BPC section 6068.1, effective January 1, 2003, to provide a limited exception to attorneys' duty of confidentiality.

Mr. Difuntorum spoke about the Sarbanes-Oxley Act of 2002, which effectuated an overhaul of federal securities regulation. Section 307 of the Act requires the SEC to promulgate rules that establish minimum standards of professional conduct for attorneys practicing before the SEC not later than 180 days after enactment of the Act. Section 307 led to creation of the ABA's Task Force on Corporate Responsibility, which has issued a preliminary report with recommendations that describe possible amendments to the ABA Model Rules for Professional Conduct. The ABA task force will conduct a public hearing on its preliminary report at Stanford Law School on Monday, November 11<sup>th</sup>. COPRAC will consider the Sarbanes-Oxley Act at its September 20-21 meeting. Mr. Difuntorum informed the Commission that it also may have a role in considering the Act. Mr. Difuntorum suggested that the "whistleblower" subcommittee handle this new Sarbanes-Oxley issue. It was suggested that this subcommittee plan to meet at the Annual Meeting in Monterey on Thursday, October 10<sup>th</sup> to consider COPRAC's work on this matter.